

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 27 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0361-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MASUM JAMES VIJAN,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200200612

Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt

Tucson
Attorney for Petitioner

B R A M M E R, Judge.

¶1 A jury found petitioner Masum James Vijan guilty of aggravated assault and criminal damage following an altercation during which Vijan had struck an acquaintance with the end of a shotgun and had then driven his vehicle into the victim's parked vehicle. The trial court sentenced Vijan to serve consecutive, presumptive terms totaling nine years

in the Department of Corrections. We affirmed his convictions and sentences on appeal. *State v. Vijan*, No. 2 CA-CR 2004-0122 (memorandum decision filed Mar. 16, 2005).

¶2 In a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., Vijan sought to be resentenced to mitigated terms of imprisonment, asserting the trial court had failed to give sufficient weight at sentencing to the mitigating circumstance of Vijan’s mental illness. The trial court denied relief, noting correctly that “[a] sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented” and that, provided the court gives such evidence due consideration, “[t]he weight to be given any factor asserted in mitigation rests within the sentencing court’s sound discretion.” Further, the trial court noted, there is no requirement that a court articulate its reasons for imposing a presumptive sentence.

¶3 We do not find fault with the trial court’s statement of the applicable law, but the issue Vijan raises is one he could and should have raised on appeal. As our memorandum decision on his appeal makes clear, the issue of his mental health had been placed before the trial court well before sentencing. According to Vijan himself, he had filed a motion to vacate judgment, on which the trial court held an evidentiary hearing several weeks before Vijan’s sentencing. In conjunction with the motion, he had raised the issue of his original trial counsel’s alleged failure to adequately investigate his mental illness. In response to Vijan’s allegation, the court ordered a psychiatric evaluation, and the results of that evaluation were provided to the trial court.

¶4 As a consequence of those events, it seems clear that the trial court was fully aware before sentencing of the issue concerning Vijan's mental health. Regardless, because the issue is one Vijan could and should have presented on appeal, it is now precluded pursuant to Rule 32.2(a)(3). Accordingly, we grant the petition for review, but we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge